

Introduced by Senator Scott

February 11, 2003

An act to amend Section 366.26 of the Welfare and Institutions Code, relating to dependent children.

LEGISLATIVE COUNSEL'S DIGEST

SB 166, as introduced, Scott. Dependent children.

Existing law requires a court to order a child who is free from the custody and control of both parents to order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement. Existing law also provides that the application of a relative caretaker or foster parent who has cared for a dependent child for whom the court has approved a permanent plan for adoption or who has been freed for adoption shall be given preference with respect to that child over all other applications for adoptive placement under certain circumstances.

This bill would require a court to review the department's or the agency's decision to deny the application of a relative caretaker or foster parent to adopt the child upon the request of that relative caretaker or foster parent, as specified. The bill would authorize the court to overrule that decision and place the child with the relative caretaker or foster parent for adoption if the court finds that the denial of the application was not in the child's best interest, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.



The people of the State of California do enact as follows:

SECTION 1. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings. Section 8714.7 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, that shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, or 366.22, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(3) Appoint a legal guardian for the child and order that letters of guardianship issue.

(4) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

In choosing among the above alternatives the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(B) A child 12 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The child is living with a relative or foster parent who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal

1 or financial responsibility for the child, but who is willing and
2 capable of providing the child with a stable and permanent
3 environment and the removal of the child from the physical
4 custody of his or her relative or foster parent would be detrimental
5 to the emotional well-being of the child. This subparagraph does
6 not apply to any child who is living with a nonrelative and who is
7 either (i) under six years of age or (ii) a member of a sibling group
8 where at least one child is under six years of age and the siblings
9 are, or should be, permanently placed together.

10 (E) There would be substantial interference with a child's
11 sibling relationship, taking into consideration the nature and
12 extent of the relationship, including, but not limited to, whether the
13 child was raised with a sibling in the same home, whether the child
14 shared significant common experiences or has existing close and
15 strong bonds with a sibling, and whether ongoing contact is in the
16 child's best interest, including the child's long-term emotional
17 interest, as compared to the benefit of legal permanence through
18 adoption.

19 If the court finds that termination of parental rights would be
20 detrimental to the child pursuant to subparagraph (A), (B), (C),
21 (D), or (E), it shall state its reasons in writing or on the record.

22 (2) The court shall not terminate parental rights if at each and
23 every hearing at which the court was required to consider
24 reasonable efforts or services, the court has found that reasonable
25 efforts were not made or that reasonable services were not offered
26 or provided.

27 (3) If the court finds that termination of parental rights would
28 not be detrimental to the child pursuant to paragraph (1) and that
29 the child has a probability for adoption but is difficult to place for
30 adoption and there is no identified or available prospective
31 adoptive parent, the court may identify adoption as the permanent
32 placement goal and without terminating parental rights, order that
33 efforts be made to locate an appropriate adoptive family for the
34 child within a period not to exceed 180 days. During this 180-day
35 period, the public agency responsible for seeking adoptive parents
36 for each child shall, to the extent possible, contact other private and
37 public adoption agencies regarding the availability of the child for
38 adoption. During the 180-day period, the public agency shall
39 conduct the search for adoptive parents in the same manner as
40 prescribed for children in Sections 8708 and 8709 of the Family



Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (3), or (4) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is the age of seven years or more.

(4) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in subparagraph (A), (B), (C), (D) or (E) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. When the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents. The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or exclusive-use home which has been certified by the agency as meeting licensing standards. The licensed foster

1 family agency shall be responsible for supporting the child and for
2 providing appropriate services to the child, including those
3 services ordered by the court. Responsibility for the support of the
4 child shall not, in and of itself, create liability on the part of the
5 foster family agency to third persons injured by the child. Those
6 children whose care, custody, and control are transferred to a foster
7 family agency shall not be eligible for foster care maintenance
8 payments or child welfare services, except for emergency
9 response services pursuant to Section 16504.

10 (d) The proceeding for the appointment of a guardian for a
11 child who is a dependent of the juvenile court shall be in the
12 juvenile court. If the court finds pursuant to this section that legal
13 guardianship is the appropriate permanent plan, it shall appoint the
14 legal guardian and issue letters of guardianship. The assessment
15 prepared pursuant to subdivision (g) of Section 361.5, subdivision
16 (i) of Section 366.21, and subdivision (b) of Section 366.22 shall
17 be read and considered by the court prior to the appointment, and
18 this shall be reflected in the minutes of the court. The person
19 preparing the assessment may be called and examined by any party
20 to the proceeding.

21 (e) The proceeding for the adoption of a child who is a
22 dependent of the juvenile court shall be in the juvenile court if the
23 court finds pursuant to this section that adoption is the appropriate
24 permanent plan and the petition for adoption is filed in the juvenile
25 court. Upon the filing of a petition for adoption, the juvenile court
26 shall order that an adoption hearing be set. The court shall proceed
27 with the adoption after the appellate rights of the natural parents
28 have been exhausted. The full report required by Section 8715 of
29 the Family Code shall be read and considered by the court prior to
30 the adoption and this shall be reflected in the minutes of the court.
31 The person preparing the report may be called and examined by
32 any party to the proceeding. It is the intent of the Legislature,
33 pursuant to this subdivision, to give potential adoptive parents the
34 option of filing in the juvenile court the petition for the adoption
35 of a child who is a dependent of the juvenile court. Nothing in this
36 section is intended to prevent the filing of a petition for adoption
37 in any other court as permitted by law, instead of in the juvenile
38 court.



(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child do require this protection, the court shall appoint counsel to represent the child. If the court finds that the interests of the child require the representation of counsel, counsel shall be appointed whether or not the child is able to afford counsel. The child shall not be present in court unless the child or the child's counsel so requests or the court so orders.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The child is likely to be intimidated by a formal courtroom setting.

(3) The child is afraid to testify in front of his or her parent or parents.

1 After testimony in chambers, the parent or parents of the child
2 may elect to have the court reporter read back the testimony or
3 have the testimony summarized by counsel for the parent or
4 parents.

5 The testimony of a child also may be taken in chambers and
6 outside the presence of the guardian or guardians of a child under
7 the circumstances specified in this subdivision.

8 (i) Any order of the court permanently terminating parental
9 rights under this section shall be conclusive and binding upon the
10 child, upon the parent or parents and upon all other persons who
11 have been served with citation by publication or otherwise as
12 provided in this chapter. After making the order, the court shall
13 have no power to set aside, change, or modify it, but nothing in this
14 section shall be construed to limit the right to appeal the order.

15 (j) If the court, by order or judgment declares the child free
16 from the custody and control of both parents, or one parent if the
17 other does not have custody and control, the court shall at the same
18 time order the child referred to the State Department of Social
19 Services or a licensed adoption agency for adoptive placement by
20 the agency. However, no petition for adoption may be granted until
21 the appellate rights of the natural parents have been exhausted. ~~The~~
22 *Subject to paragraphs (1) and (2) of subdivision (k), the State*
23 *Department of Social Services or licensed adoption agency shall*
24 *be responsible for the custody and supervision of the child and*
25 *shall be entitled to the exclusive care and control of the child at all*
26 *times until a petition for adoption is granted. With the consent of*
27 *the agency, the court may appoint a guardian of the child, who shall*
28 *serve until the child is adopted.*

29 (k) (1) Notwithstanding any other provision of law, the
30 application of any person who, as a relative caretaker or foster
31 parent, has cared for a dependent child for whom the court has
32 approved a permanent plan for adoption, or who has been freed for
33 adoption, shall be given preference with respect to that child over
34 all other applications for adoptive placement if the agency making
35 the placement determines that the child has substantial emotional
36 ties to the relative caretaker or foster parent and removal from the
37 relative caretaker or foster parent would be seriously detrimental
38 to the child's emotional well-being.

39 (2) *If the department or the agency has reviewed the*
40 *application of a relative caretaker or foster parent who is a person*

described in paragraph (1) and denies that application or refuses to place the child with the relative caretaker or foster parent for adoption, the relative caretaker or foster parent who submitted the application may petition the court to review that decision. If a relative caretaker or foster parent requests judicial review, the court shall conduct a hearing to review the decision. The child may not be removed from the current placement until after the hearing, except by order of court. At the hearing, the court shall hear relevant testimony from all parties, including representatives of the department or agency that has responsibility for the placement and care of the child. In reviewing the decision, the court shall consider all relevant evidence, including, but not limited to, the reasons why the department or agency denied the application, any history of child abuse, any history of substance abuse, and the nature and extent of the child's relationship with the petitioner. After reviewing the decision, if the court finds that the decision to deny the application was not in the child's best interest, the court may overrule that decision and order that the child be placed with the relative caretaker or foster parent for adoption.

(3) Nothing in subdivision (j) or this subdivision may be construed to relieve the department or the agency of its responsibility for the custody and supervision of a child until the child has been placed for adoption.

(4) As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(l) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following applies:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an

1 adequate record shall preclude subsequent review by appeal of the
2 findings and orders made pursuant to this section.

3 (3) The Judicial Council shall adopt rules of court, effective
4 January 1, 1995, to ensure all of the following:

5 (A) A trial court, after issuance of an order directing a hearing
6 pursuant to this section be held, shall advise all parties of the
7 requirement of filing a petition for extraordinary writ review as set
8 forth in this subdivision in order to preserve any right to appeal in
9 these issues. This notice shall be made orally to a party if they are
10 present at the time of the making of the order or by first-class mail
11 by the clerk of the court to the last known address of a party not
12 present at the time of the making of the order.

13 (B) The prompt transmittal of the records from the trial court
14 to the appellate court.

15 (C) That adequate time requirements for counsel and court
16 personnel exist to implement the objective of this subdivision.

17 (D) That the parent or guardian, or their trial counsel or other
18 counsel, is charged with the responsibility of filing a petition for
19 extraordinary writ relief pursuant to this subdivision.

20 (4) The intent of this subdivision is to do both of the following:

21 (A) Make every reasonable attempt to achieve a substantive
22 and meritorious review by the appellate court within the time
23 specified in Sections 366.21 and 366.22 for holding a hearing
24 pursuant to this section.

25 (B) Encourage the appellate court to determine all writ
26 petitions filed pursuant to this subdivision on their merits.

27 (5) This subdivision shall only apply to cases in which an order
28 to set a hearing pursuant to this section is issued on or after January
29 1, 1995.

30 (m) Except for ~~subdivision (j)~~ *subdivisions (j) and (k)*, this
31 section shall also apply to minors adjudged wards pursuant to
32 Section 727.31.

